



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MIGORI

ELC CASE NO. 251 OF 2017

JOEL AYOMA MAGANGA.....PLAINTIFF

VERSUS

ANDREW ONYANGO NYASIGAWA.....1ST DEFENDANT

CAROLINE AWINO MUSA.....2ND DEFENDANT

JUDGMENT

1. By a plaint dated 21st October 2016, and filed in court on the even date, the plaintiff through G.S Okoth and Co Advocates has sued the defendant for the following reliefs:

a) An order of rectification of the register by deleting the names of Onyango Andrew Nyasigawa and Caroline Awino Musa from the register of Land Parcel Nos. SUBA/KAMWENDA/5926 and 1819 respectively and replacing the same with the name of JOEL AYOMA MAGANGA.

b) An order of prohibitory injunction prohibiting the defendants from alienating by sale or otherwise cultivation, occupation or in any other way dealing with any of the abovementioned parcels of land or any portions thereof in any manner adverse to the interest of the plaintiff thereto.

c) Costs of this suit together with interest thereon at the rate of 14% p.a from the date of filing suit until payment in full .

d) Such further or other alternative relief as this Honourable Court deems fit to grant.

2. The gist of the plaintiff's case is that the suit property is comprised of LR. NO Suba/Kamwenda/5926 approximately 1.06 hectares in area and LR. NO Suba/Kamwenda/1819 approximately 0.25 hectares in area (the first and second suit parcels of land respectively). That the suit property originally belonged to the late Nyasigawa Ayoma(Deceased1) who had two(2) wives with children. That the younger wife Mgore W/O Nyasigawa (Deceased2) begot Maganga Nyasigawa (Deceased3) and Ojunge Nyasigawa(Deceased4) who sired children including the plaintiff and Jeremiah Nyasigawa Ojunge (Deceased5). That the 1st defendant, a son of deceased5 unlawfully entered into the 2nd suit parcel of land which was registered partly for the family of deceased 3 and deceased 4.

3. The plaintiff further claims that during land adjudication in Kamwenda Adjudication section, the defendants with intent to defraud the family of deceased 3 of their rights and interest in the 1st and 2nd suit parcels of land, gave false information to the area land adjudication officer. As a result, the defendants obtained registration of the said two parcels of land fraudulently hence precipitating the instant suit.

4. The defendants were duly served on 23/5/2018 and 29/10/2018 as shown on affidavits including the affidavit of service filed in court on 21/11/2018. However, the defendants failed to enter appearance and or file any statement of defence within the prescribed period of time or at all.

5. This suit was heard on 16/1/2019 and the plaintiff (PW1) adduced evidence by reliance on his statement dated 21st October 2016 as part of his examination in chief. He also relied on his list of documents dated 21st October 2016 (PEXhibits 1 to 5).

6. Learned counsel for the plaintiff filed submissions dated 8th July 2019, whereby reference was made to **sections 24,25,26 and 80(1) of the Land Registration Act, 2016 (2012)** as well as **section 24 of the Registration of Titles Act**. Counsel submitted that the defendants held the 1st and 2nd suit parcels of land in trust for the entire family of deceased 3 and cited the case of **Mumo v Makau (2002)1EA 170** to the that effect.

7. I have examined the entire case for the plaintiff and the attendant submissions. I bear in mind the Court of Appeal decision in **Galaxy**

Paints Co. Ltd v Falcon Grounds Ltd (2000) 2EA 385 on issues for determination in a suit. So, it is the duty of this court to determine the existence of the alleged fraudulent registration, trust and whether the reliefs sought herein are available to the plaintiff.

8. In respect of the alleged fraudulent registration, I note the particulars of fraud at paragraph 8 of the plaint and the sections of the law cited in the submissions. I also take into account the evidence adduced in form of statement of PW1.

9. Black's Law Dictionary 10th Edition defines the term "**fraud**" as follows;

"A knowing misrepresentation or knowing concealment of a material fact made to induce another to act to his or her detriment."

10. It is trite law that any allegations of fraud must be distinctly pleaded and strictly proved to the requisite standard; see **Ndolo v Ndolo (2008) IKLR (G & F) and Kuria Kiarie & 2 others v Sammy Magera (2018) eKLR**.

11. The plaintiff (PW1) has specifically pleaded and stated particulars of fraud on the face of his plaint. He has proved by way of PExhibits 1 to 5 that the defendants resorted to multifarious means to get advantage over him in suppression of the truth in obtaining title to the 1st and 2nd suit parcels of land; see also the case of **Abiero v Thabiti Finance Co. Ltd & another (2001) KLR 496**.

12. On the issue of trust, I am guided by **sections 25 and 28(b) of the Land Registration Act (supra)**. The statement of PW1 including PExhibits 1, 3 and 4 reveal that the 1st and 2nd suit parcels of land belong to the family of deceased 3.

13. It therefore emerges that the 1st and 2nd suit parcels of land originally belonged to the family of deceased 1 and 2 prior to the registration of the same in the name of the defendants who are members of that family; see **Mumo case (supra)** and the Supreme Court of Kenya decision in the case of **Isack M'Inanga Kiebia v Isaaya Theuri M'Lintari and another (2018) eKLR**.

14. In the premises, I find that the plaintiff's suit is unchallenged and has been proved against the defendants on a balance of probabilities. The plaintiff is entitled to the reliefs sought in the plaint.

15. A fortiori, I enter judgment for the plaintiff against the defendants jointly and severally in terms of orders (a) and (b) sought in his plaint dated 21st October 2016.

16. The defendants to bear the costs of this suit.

17. It is so ordered,

DELIVERED DATED and SIGNED at MIGORI this 17th day of September 2019.

G.M.A. ONGONDO

JUDGE

In the presence of :-

Mr. Odondi Awino holding brief for Mr. G.S. Okoth for the plaintiff.

Court Assistant – Tom Maurice.